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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 730

ALBERT BACSKO,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

FREDERICK KLAESSIG,
Attorney for Petitioner,
880 Bergen Avenue,
Jersey City, New Jersey.

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL PROVISION INVOLVED	4
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	9
POINT I—The Prosecution offered no evidence that the unidentified companion-witness of the police officer, was an informer	9
POINT II—It is a violation of due process when the Prosecution withholds evidence from the defense	11
POINT III—The decision of the Supreme Court of New Jersey is believed to be erroneous and contrary to the decision of this Court in Roviaro v. United States, 353 U. S. 53, 1 L. ed. 2d 639 (1957)	12
POINT IV	15
CONCLUSION	16
APPENDIX:	
A—Per Curiam Opinion of the Superior Court of New Jersey, Appellate Division	1a
Mandate on Affirmance of the Superior Court of New Jersey, Appellate Division	8a
B—New Jersey Supreme Court Order Granting Petition for Certification	9a

PAGE

C—New Jersey Supreme Court Opinion, 5 N. J. 49 ..... 10a

D—New Jersey Supreme Court Opinion, 50 N. J. 39 Re: State of New Jersey, Plaintiff-Appellant v. Chester Oliver, Defendant-Respondent 11a

E—Petition for Rehearing to the Supreme Court of New Jersey, Re: State of New Jersey v. Chester Oliver..... 23a

F—Letter of July 27, 1967 to Supreme Court of New Jersey, Re: State of New Jersey v. Chester Oliver..... 27a

G—New Jersey Supreme Court Mandate on Affirmance 28a

H—New Jersey Supreme Court Order Denying Petition for Rehearing..... 29a

Cases Cited

Brady v. Maryland, 373 U. S. 83..... 11

McCray v. Illinois, 386 U. S. 300 (1967)..... 15

Ohio Bell Telephone Co. v. Public Utilities Com'n, 301 U. S. 292..... 9

Pointer v. Texas, 380 U. S. 400..... 15

Roviaro v. United States, 353 U. S. 53, 1 L. ed. 639 (1957) 12, 13

Rudder v. United States, 96 U. S. App. D. C. 329, 226 F. 2d 51..... 9

Slochower v. Board of Education, 350 U. S. 551..... 9

State v. Bacsko, 48 N. J. 139..... 8

PAGE

State v. Bacsko, 50 N. J. 49 ..... 1, 2, 8, 10

State v. Oliver, 50 N. J. 39 (1966) 1, 2, 9, 10, 14

Yick Wo v. Hopkins, 118 U. S. 356 9

United States Constitution Cited

Sixth Amendment 3, 4, 15

Fourteenth Amendment 2-4, 15

Statutes Cited

N.J.S.A. 2A:84A-28 4

N.J.S.A. 2A:112-3 ..... 2, 5

28 U.S.C.:

Sec. 1257 (3) 3

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petitioner, Albert Bacsko, prays that a writ of Certiorari issue to review the judgment of the Supreme Court of New Jersey, entered in this case on July 20, 1967, but suspended on Petition for Re-Hearing until October 3, 1967.

Opinions Below

The opinion of the New Jersey Supreme Court is printed in Appendix C *infra*, and reported in 50 N. J. 49, as *State* v. *Bacsko*. This opinion adopts the reasons of a companion case printed in Appendix D *infra*, and reported as *State* v.

Oliver, 50 N. J. 39. The New Jersey Supreme Court had certified the judgment of the New Jersey Superior Court, Appellate Division, affirming the conviction of defendant in the Monmouth County Court for violation of N.J.S.A. 2A:112-3, a criminal charge of Bookmaking. The order of certification is reported in 48 N. J. 139 (1966) and as Appendix "B", *infra.* The unreported opinion of the New Jersey Supreme Court, Appellate Division is printed in Appendix "A", *infra.*

Jurisdiction

The judgment of the Supreme Court of New Jersey, here sought to be reviewed was entered on July 20, 1967 (Appendix G, *infra*), with a reported opinion (Appendix D and Appendix C, *infra*) filed on July 20, 1967, affirming the judgment of the New Jersey Superior Court, Appellate Division (after granting Certification; Appendix B), which in turn had affirmed with unreported opinion, the conviction of defendant in the Monmouth County Court of a violation of the crime of Bookmaking on horses, in violation of N.J.S.A. 2A:112-3, a gambling offense.

Between the time of the reported opinions (*State* v. *Bacsko,* 50 N. J. 49; *State* v. *Oliver,* 50 N. J. 39) and the denial of a Petition for Re-Hearing on October 3, 1967, defendant had filed an informal petition for a Re-Hearing (Appendix E and Appendix F), which was denied on October 3, 1967 (Appendix H). This Petition for Re-Hearing suspended the Mandate of Affirmance (Appendix G, *infra*), until October 3, 1967.

The Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3), since the petitioner is claiming the abridgement of rights, privileges or immunities under the Constitution of the United States, more particularly the Fourteenth Amendment, and is claiming a denial of Due Process and the Equal Protection of the laws, thereunder.

Questions Presented

1. Is the Due Process clause of the Fourteenth Amendment to the United States Constitution violated when the Prosecution successfully invokes the Informer's Privilege to conceal the identity of a necessary witness for the Defense, and such invocation is based on the testimony of the State's main witness, a police officer, who arbitrarily labels the unidentified witness an Informer, without factual support, and in order to counter the defendant's attack upon the police officer's credibility?

2. Is a defendant in a criminal trial entitled to an independent judicial determination concerning the existence of the alleged Informer or is such determination exclusively in the power of the Police?

3. Is the Due Process clause of the Fourteenth Amendment to the United States Constitution violated by the Prosecution's suppression of the identity of a witness to the alleged crime, when such witness is relevant, helpful and necessary to the defense of the accused, and to a fair determination of the cause, including defendant's innocence of the alleged crime, the credibility of the State's main witness and whether or not the defendant is actually being confronted with the witness against him in view of the defendant's allegation that the main witness, the Police officer, was not present at the scene of the alleged crime but the unidentified witness denominated arbitrarily as an Informer was present?

4. Was the suppression of the "Informer's Identity" a denial of defendant's rights under the Sixth Amendment of the United States Constitution, to be confronted with the witness against him, when the defendant alleged that the Police officer was not an eye-witness because he had not been present at the alleged scene of the crime?

Constitutional Provision Involved

UNITED STATES CONSTITUTION—Fourteenth Amendment

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

UNITED STATES CONSTITUTION—Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense."

N.J.S.A. 2A:84A-28:

"A witness has a privilege to refuse to disclose the identity of a person who has furnished information purporting to disclose a violation of a provision of the laws of this State or of the United States to a representative of the State or the United States or a governmenal division thereof, charged with the duty of enforcing that provision, and evidence thereof is inadmissible, unless the judge finds that (a) the

identity of the person furnishing the information has already been otherwise disclosed or (b) disclosure of his identity is essential to assure a fair determination of the issues."

The State statute whose violation is charged in the indictment, N.J.S.A. 2A:112-3 (Bookmaking on horses), is not printed herein because no issue relating thereto is involved in this petition for certiorari.

Statement of the Case

In September 1964, the defendant Albert Bacsko, was indicted by the Monmouth County Grand Jury, in one count, charging a violation of N.J.S. 2A:112-3, for taking book upon the running of horses, from April 8, 1964 to May 27, 1964 (Indictment No. I.35-64), and he was also indicted for violation of N.J.S. 2A:112-3, separately, for keeping "a place to which persons might resort for gambling and with intent that such persons might and should resort", but this indictment (No. I.64-15) was dismissed at the end of the State's case at the trial.

Before the trial, the defendant made a motion for an Order to obtain the name and address of a witness who had accompanied the State's main witness, Detective Decker of the New Jersey State Police, to the defendant's Tavern, on several occasions. Officer Decker had previously testified at an Alcholic Beverage Commission hearing against the defendant, concerning the accusations alleged in the Indictments. It was thus that defendant learned before trial that Officer Decker had been accompanied by some other person when he had defendant's Tavern under surveillance. At the ABC hearing, Officer Decker refused to reveal the identity of this witness on the ground that such witness was an "informer", but he did concede that the

companion was in a position in the Tavern to observe all that went on and had spoken Hungarian with the defendant.

In an affidavit submitted by defendant in support of his motion before trial for a Bill of Particulars and Discovery of the identity of the companion-witness of Officer Decker, defendant denied that Officer Decker had entered his Tavern on April 9, 13, 15, 28 and May 11, 1964 (as testified to by Officer Decker at the ABC hearing), and denied that any horse betting had taken place. Defendant alleged in his affidavit that it was the "Hungarian" who had come in alone on several of those dates on which Officer Decker testified he had entered the Tavern, so that Officer Decker could not have witnessed gambling even if it had occurred. Defendant deposed and asserted that he needed the identity of the companion-witness of Officer Decker so that he could produce such witness as a material witness at his trial for proof of his innocence and to impeach the credibility of Officer Decker. Defendant argued that the testimony of the witness was relevant, material and necessary to the defense and for a fair determination of the truth of the charge in the indictment; that no gambling had in fact taken place; that Officer Decker had not been in the Tavern on each occasion he stated and that someone had "furnished" false information to Officer Decker, to which he was testifying to as of his own knowledge. The defendant also deposed and argued that he needed the identity of the companion-witness to help establish his defense that one William Kazerow, had threatened defendant to "get even" because of defendant's cooperation with the authorities in exposing William Kazerow as involved in the passing of a counterfeit Ten Dollar bill. Defendant argued at the Motion hearing that he could not prepare for the eventual trial unless he could obtain the identity of the missing witness and produce him for his Defense at the trial. The motion of defendant before trial, was denied.

The trial began on September 22, 1965 and the main witness for the State was the same Officer Decker. He testified that he was a State Trooper who was an "undercover man" and had been assigned to observe defendant's Tavern. He testified that he saw defendant appear to take bets at the Bar on April 9, 13, 15, 28 and May 11, 1964, and that he was accompanied by a companion who spoke Hungarian on April 9, 1964 and *on other occasions* during the period in question but that he did not "remember the exact number of times that he went into the bar with him". The companion would make remarks to Officer Decker as to what he saw "because he seen some things and he didn't see exactly what I saw", and the companion-witness would question Officer Decker as to whether he had "observed a piece of paper" and would make other remarks. The "companion" was a person who accompanied Officer Decker on some "other jobs" to which he was assigned during the same period of time. Officer Decker testified that the companion was an "Informer".

At the trial, the defendant requested the name and address of the companion-witness, on cross-examination of Officer Decker. The State objected and was sustained. Defendant argued that he needed the alleged Informer as a witness for the Defense and a fair determination of the issues (including the credibility of Officer Decker), as he had done before Trial, on Motion. No testimony or other evidence, other than the bare statement of Officer Decker, in conclusory form, that the companion-witness was an "informer", was adduced by the State.

The defendant Bacsko testified in his own defense. He testified that he was on duty, tending bar, during the periods that Officer Decker had allegedly come into the Tavern and denied taking any horse bets or "keeping book". Defendant had been convicted of "bookmaking" some years

before 1964 but denied any illegality since then. He testified that he knew Officer Decker "by sight" and that Officer Decker had come into the Tavern in disguise as a working man accompanied by a Hungarian-speaking companion, only once, but that the "Hungarian" came into the Tavern several times alone in April and May 1964. Defendant testified that one William Kazerow had cashed a counterfeit Ten Dollar bill in the Tavern, and that defendant had reported this to the Police. William Kazerow threatened defendant and said he would "get even". Defendant was the only bartender on duty when Officer Decker was allegedly in the Tavern.

There were other witnesses, both for the State and for the Defense, but the State's main witness was Officer Decker and the main witness for the Defense was the defendant.

The Jury convicted the defendant of the charge under the indictment (Bookmaking) and he was sentenced to New Jersey State Prison for a term of not less than one year and not more than two years.

The defendant appealed to the New Jersey Superior Court, Appellate Division, which affirmed the Conviction with an unreported opinion, denying the right of defendant to disclosure by the Prosecution of the identity of the companion-witness, on the ground that the Prosecution enjoyed an Informer Privilege. The defendant petitioned the New Jersey Supreme Court for certification of the judgment of the Appellate Division, and certification was granted (Appendix B; *State* v. *Bacsko,* 48 N. J. 139). The New Jersey Supreme Court affirmed the judgment of the Appellate Division, New Jersey Superior Court (Appendix G, *infra*) with a reported opinion (*State* v. *Bacsko,* 50 N. J. 49; Appendix C), which adopted the opinion of *State* v. *Oliver,* a companion case (Appendix D; 50 N. J. 39) which

reasoned primarily that the Informer Privilege could be invoked where the "Informer" had no function to provide information but served only as visual and auditory camouflage to protect the Undercover agent (*State* v. *Oliver*, 50 N. J. 39, 41). There was no evidence to support such a rationalization factually or functionally.

The defendant joined informally in a petition to the New Jersey Supreme Court for a Re-Hearing (Appendix E, *infra;* Appendix F, *infra*) but such petition was denied on October 3, 1967 (Appendix H) and the Mandate of Affirmance issued on July 20, 1967 became effective.

REASONS FOR GRANTING THE WRIT

POINT I

The Prosecution offered no evidence that the unidentified companion-witness of the police officer, was an informer.

This Court has over and over again, stressed that the "nature and the theory of our institutions of government, the principles upon which they are supposed to rest . . . do not mean to leave room for the play and action of purely personal and arbitrary power" (*Yick Wo* v. *Hopkins*, 118 U. S. 356, 369-370) and that the essence of due process is the "protection of the individual against arbitrary action." *Ohio Bell Telephone Co.* v. *Public Utilities Com'n*, 301 U. S. 292, 302; *Slochower* v. *Board of Education*, 350 U. S. 551, 559. Arbitrary action is not due process. *Rudder* v. *United States*, 96 U. S. App. D. C. 329, 331, 226 F. 2d 51, 53.

The very Police Officer, whose credibility was in issue (Officer Decker) testified to the conclusory "fact" that the

companion-witness was an "informer" and this conclusion was not corroborated by any other evidence, or testimony. There was no structured minimum of proof to establish the companion-witness factually as an Informer, and the State's main witness, the police officer, whose integrity was being attacked by the defendant, could foreclose any further scrutiny of the appellation of "informer" by an "action of purely personal and arbitrary power," so as to permit the State to invoke the "Informer Privilege."

The New Jersey Supreme Court, found factually, in its opinion (*State* v. *Oliver*, 50 N. J. 39, 41) that the "Informer" was not an Informer, when it described his role as follows:

> "We gather the informer accompanied Decker only because the informer was a familiar figure at the bar and hence his presence tended to shield Decker from suspicion that he might have generated as a stranger."

There was no evidence to support this factual finding, but if there had been then it rules out the companion-witness as an Informer and invokes the equivalent privilege for any member of the Police retinue shielding the Police from detection as Police. The Prosecution never invoked such a privilege. It invoked the Informer Privilege, a different entity. There is no Camouflage Privilege.

Officer Decker, the undercover agent, was the same police officer in the case of *State* v. *Bacsko,* as in *State* v. *Oliver,* and the alleged Informer was the same person in both cases, functioning in both cases, as a "shield from suspicion" to permit Officer Decker to operate successfully (as argued by the New Jersey Supreme Court) as an undercover agent. If this were a fact, then not only is the unidentified witness not entitled to anonymity, but his very value as a witness for the Defense is made certain.

POINT II

It is a violation of due process when the Prosecution withholds evidence from the defense.

Without a minimum of proof that a particular witness is in fact an informer, the Prosecution could designate any essential witness for the defense as an informer, whether or not he is another police official, a stranger to the case, a witness in favor of the defendant, or an informer. This Court has held in *Brady* v. *Maryland,* 373 U. S. 83, 87 that:

> "A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the Prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not the 'result of guile' . . ."

It violates due process to suppress evidence, directly or indirectly.

The defendant in a criminal trial is entitled to bring into Court any material witness necessary for his Defense, when the State has knowledge thereof. The Defendant is entitled to Discover the existence and identity of such potential witness for the Defense, before trial.

> "Suppression of evidence by the prosecution, of evidence favorable to an accused who has requested it violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith of the prosecution."
>
> *Brady* v. *Maryland, supra,* 86.

POINT III

The decision of the Supreme Court of New Jersey is believed to be erroneous and contrary to the decision of this Court in *Roviaro* v. *United States*, 353 U. S. 53, 1 L. ed. 2d 639 (1957).

> "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." *Roviaro* v. *U. S.*, *supra*, 60-61.

The defendant meets the criteria set up by the Decisions of this Court in *Roviaro*:

1. His defense is that in fact he did not take bets, and the alleged "Informer" would corroborate him in that defense, and contradict Officer Decker on each date including April 9, 1964 (the first date).

2. He alleges that the notes taken by Officer Decker did not reflect his own observations, and when they were testified to at the trial as "past memory recorded" they constituted "communications" in part, from an "informant", whom the defendant had no opportunity to cross-examine.

3. Alternatively, his defense is that the "informant" would testify that he alone was in the Tavern on occasions, and gave information to Officer Decker, which Officer Decker recorded and testified to as his own eye-witness accounts.

4. Alternatively, his defense would be that the "Informer" came into the Tavern on occasions, saw no Gambling and reported the truth to Officer Decker, who then made false entries.

5. Alternatively, his defense would be that the "Informer" was a witness who would testify that *he was not* an Informer, and also testify to numerous facts that would reflect on the credibility of Officer Decker.

6. His Defense would be that the "Informer" was a friend or employee of William Kazerow, whose exposure in a Counterfeit case by defendant, was being revenged, and/or the "Informer" was a Internal Revenue Agent or other Police Official, regularly employed as such, but not assigned to Gambling.

7. His defense would be that false testimony was organized against the defendant with the aid of a patron of the Tavern.

The defendant contended on his Motion before trial, and at the trial, that Officer Decker was not in his Tavern on each and every date he testified to, but that the companion-witness whom Officer Decker had brought along on April 9, 1964, was in defendant's Tavern alone and without Officer Decker on the other dates. In *Roviaro,* this Court held, amongst other reasons, that the defendant was entitled to the identity of a *proved* informer because:

> "So far as petitioner knew, he and John Doe were alone and unobserved during the crucial occurrence for which he was indicted."
>
> *Roviaro* v. *United States,* 353 U. S. at 63.

The demand for disclosure by the defendant, implicated the issue of defendant's guilt or innocence, and the law-enforcement policy against disclosure of the *proved* informer, must give way to the need for a truthful verdict. The presence of the alleged informer at the scene of the alleged crime does take him out of the protection of the informer privilege when it is the contention of the Defense that no

crime took place and the State has not established with independent evidence (independent of the Police Officer whose credibility is being impeached) that the companion-witness was an informer who "was no more than a witness to the criminal event." The Supreme Court of New Jersey, in its decision (Appendix D), allows the Police Officer's testimony to conclude the issue, in summary fashion, as to whether or not the unidentified person was an "informer" and as to whether or not he was "no more than a witness to a criminal event." The defendant contends that the unidentified person was a witness to *innocent* events and this evidence is necessary to his defense.

The New Jersey Supreme Court recognizes that a procedure to determine whether or not an informer's testimony could be helpful to a defendant, could be a necessity for a defendant, and speculates as to whether or not the power to learn such a potentiality should be committed to the trial judge privately, or by means of a written statement of an undisclosed informer, to determine whether his testimony would aid the defendant. But the court, amongst other reasons, fails to formulate such a procedure because:

> "Not infrequently an informer is known only to a single police officer and would not consent to a disclosure of his identity to a superior officer, or even the prosecutor." *State v. Oliver, supra,* 48; Appendix D, *infra.*

Such a criterion of nondisclosure would make the police officer the sole judge of the function or existence of any witness who is present at any scene of alleged crime, and whose identity is unknown to a defendant. Such power in the hands of a Police Officer, was involved in the case *sub judice,* to insure that Officer Decker exercised a monopoly of "truth." The monopoly was assured by concealing the

identity of his companion by artificially labeling him an informer, and by the knowledge that the defendant's credibility would be cancelled by proof of a previous conviction for the same crime with which he was being charged. There could be no fair determination of the issue of guilt or innocence without the disclosure of the identity of the companion-witness.

> "It is not unknown for the arresting officer to misrepresent his connection with the informer, his knowledge of the informer's reliability, or the information allegedly obtained from the informer. See, e.g. United States v. Pearce, 275 F. 2d 318, 322."
>
> Footnote 2, cited by Justice Douglas, in the dissent in *McCray* v. *Illinois,* 386 U. S. 300, 316 (1967).

POINT IV

The defendant's right of confrontation with the unidentified witness under the Sixth Amendment, applicable to the States through the Fourteenth Amendment, *Pointer* v. *Texas,* 380 U. S. 400, is based on his testimony (and on his affidavit before trial) that Officer Decker had appeared in defendant's tavern with a companion-witness who spoke Hungarian, only on April 6, 1964, and that thereafter the companion-witness appeared alone during April and May, without the police officer. Consequently, when Officer Decker testified to having witnessed criminal bets after April 6, 1964, in the months of April and May, he was either receiving such information from the companion-witness and adopting it as his own, or his information was coming from an Informer who was not the initial companion, *or the* testimony was pure fiction. If the source of the alleged information came from the initial companion-witness, the defendant had a right to be confronted with him. The

defendant had a right to explore the source of false information.

It is submitted that the questions posed herein are of substantial constitutional dimensions meriting a determination by this Court, and the New Jersey Supreme Court has decided a constitutional question not in accord with the applicable decisions of this Court.

CONCLUSION

Wherefore, for the reasons above stated, it is respectfully submitted that this petition be granted.

Respectfully submitted,

FREDERICK KLAESSIG,
Attorney for Petitioner.

APPENDIX "A"

***Per Curiam* Opinion of the Superior Court of New Jersey, Appellate Division**

(Filed—June 24, 1966)

Argued June 13, 1966. Decided June 24, 1966.

Before Juges Goldmann, Foley and Collester.

On appeal from the Middlesex County Court.

Mr. Frederick Klaessig argued the cause for appellant (*Messrs. Klaessig & Winograd, attorneys*).

Mr. Richard S. Cohen, Assistant Prosecutor, argued the cause for the respondent (*Mr. Edward J. Dolan,* Prosecutor, attorney).

PER CURIAM

Defendant appeals from a conviction for bookmaking (N.J.S. 2A:112-3) following a jury trial which resulted in a verdict of guilty. He also appeals from an order which denied his pretrial motion to compel disclosure of an informer.

The indictment charged defendant with making book upon the running of horses between April 8 and May 27, 1964. Before trial he moved for disclosure by the State of the name and address of the informer who had accompanied State Police investigator Decker on several occasions when the latter visited defendant's tavern. At a previous hearing before the Division of Alcoholic Beverage Control defendant learned through Decker's testi-

mony that the investigator had been present in the tavern on April 9, 13, 15 and 28, and May 11, 1964, on each of which occasions he saw defendant take bets on horse races, and that the informer was with him on some of these dates. Defendant, in his supporting affidavit for a bill of particulars an discovery, denied he had taken bets or that Decker had been in his tavern on each of the dates mentioned. He alleged that the informer had been in the tavern alone on several of the dates when Decker claimed to have been there, so that Decker could not possibly have personally witnessed the taking of bets, assuming there had been such gambling activity. Defendant alleged he had to know the identity of the informer in order to establish that Decker had not been in the tavern on each of the days alleged and that gambling had not in fact taken place—in other words, that it was the informer who had furnished Decker with the information to which Decker had testified as of his own knowledge. The State refused to disclose the identity of the informer, based on the informer privilege contained in N.J.S. 2A:84A-28. The trial judge denied defendant's motion.

At the trial Decker was the first witness for the State. He testified that he was a State Police investigator assigned as an undercover man to investigate gambling activity. He first visited defendant's tavern on April 9, 1964, and thereafter on April 13, 15 and 28, and May 11, when he saw defendant take bets on horses, detailing what he observed on each occasion. The alleged informer was with him on some of those visits. Decker's testimony was based on what the personally heard and observed, and of which he made careful note immediately upon leaving the tavern. It did not reflect anything that the informer might have witnessed.

Appendix A

In answer to specific questions put on cross-examination, Decker said that the man who had accompanied him to defendant's tavern was not a member of the State Police; beyond knowing him as an informer whom he was told to meet, he had no other information about him. Decker was then asked his name. The State objected on the basis of the informer privilege. The defense relied upon the arguments it had made at the pretrial application. The prosecution's objection was sustained.

The remainder of the State's proofs related to the raid staged on the tavern premises on May 26, 1964, pursuant to a search warrant. The State Police who conducted the raid found a number of slips and other papers testified to as showing current horse bets. They also found tally sheets and horse race publications. These papers unquestionably established that off-track horse betting was conducted on the tavern premises.

Defendant took the stand to deny that Decker had been in his tavern on all the dates mentioned or that horse bets were taken at any time. His wife and some frequenters of the tavern also denied that bookmaking had taken place there.

Defendant argues that it was error to deny his application, before trial and in the course of the trial, to compel the State to disclose the identity of the informer who, he contends, was a material witness necessary to the preparation and presentation of the defense. We find to the contrary.

N.J.S. 2A:84A-28 provides that the identity of a person who has furnished information purporting to disclose a violation of the laws of this State need not be disclosed unless the trial juge finds that such disclosure "is essential

to assure a fair determination of the issues." Defendant relies upon *Roviaro* v. *United States,* 353 U. S. 53, 77 S. Ct. 612, 1 L. Ed. 2d 639 (1957), where it was held error to deny petitioner's pretrial application requesting the informer's identity and address. But in that case the undercover employee had played a material role in bringing about the possesion of certain drugs by the accused; he had been present with the accused at the ocurrence of the alleged crime, and might have been a material witness as to whether the accused knowingly transported the drugs, as charged. Moreover, following his arrest, when petitioner was confronted with the informer, the latter denied he knew or had ever seen petitioner before. In our case the informer in no way participated in the bookmaking activity. He did nothing more than bring Decker to the tavern on the occasion of the first visit, and accompanied him on some of the other visits. That he was present when the alleged bookmaking occurred does not, of itself, take him out of the protection of the statute; such presence is only one fact to be taken into consideration with all of the remaining facts in determining whether disclosure of his identity was essential to a fair determination of the issues. *State* v. *Booker,* 86 N. J. Super. 175, 179 (App. Dv. 1965).

The court in *Roviaro* said that no fixed rule with respect to disclosure is justifiable:

> "* * * The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." (353 U. S., at page 62).

Cf. State v. *Burnett,* 42 N. J. 377 (1964), where this language is quoted with approval (at page 385) in a search warrant situation. *Cf.,* also, *State* v. *Dolce,* 41 N. J. 422, 435 (1964) (entrapment).

Not only is it true that the informer was in no way connected with the bookmaking activities in defendant's tavern, but Decker's testimony, as we have observed, in no measure depended upon what the informer had heard or seen, but was based strictly upon Decker's own observations. Further, defendant was not left in a position of being unable to present his case fairly and fully. He strenuously denied all horse bet activity on his premises at any time—a denial in which he was supported by his wife and other witnesses. But he readily admitted that Decker had been present on April 9, 1964. He said this was the only occasion, but his testimony was undermined when he was faced with the record of what he had said at the A.B.C. hearing, at which he testified that he had seen Decker in the tavern "about three times," and that he had seen Decker and his Hungarian friend (the informer) "possibly about two or three times altogether." (It is also clear from the record that defendant was not to be believed when he said he recognized Decker as a state trooper on the occasion of his very first visit, April 9, 1964. Of course, his testimony of no bookmaking having taken place on the premises is belied by what was found there at the time of the raid on May 26, 1964.) In addition to defendant's testimony as to Decker's presence in the tavern, we have that of his witness Mrs. Balogh, who said she had seen him there once, in the early part of April.

Under the facts and circumstances of this case, and in light of the language of the *Roviaro* case, quoted above and adopted by our highest court in *Burnett,* we conclude that

disclosure of the informer's name and address was not essential to assure defendant a fair determination of the issues.

Defendant's next argument is addressed to the trial judge's charge wherein he said:

> "Now, in the summation of counsel for the defense, great stress was placed upon the fact that the officer who conducted the raid—strike that—that Officer Decker, when he went in prior to the raid, could have made an arrest at that time. The inference which counsel wishes you to draw is that his failure to make the arrest at that time indicated that he was not there at all. Whether or not he was there, whether you believe he was there, is for you to determine. You, as I have said, are the finders of the fact. I do wish to point out to you, however, that although Decker may have had the legal right to make an arrest at that time in general the policy of our law is that searches and seizures should not be made except by way of a warrant, which of course if Decker had made the raid at that time, if he had the raid then—when he saw the bet, if he did see it—he could not have made it pursuant to warrant. He would have to go out and get the necessary papers and get a warrant. So I charge you that the policy of the law is that if at all possible police officers should obtain warrant before they conduct raids and searches."

Defense counsel took exception to this part of the charge, but the trial judge declined to change it.

The instruction was clearly the result of the argument made by defense counsel in summation. In substance, he

argued to the jury that if Decker had seen what he testified he saw on the occasion of his five visits to the tavern prior to the raid, he would have arrested defendant then and there. His failure to do so was evidence that he really did not see what he reported.

We perceive no prejudicial error in the quoted part of the charge. The trial judge was, in effect, countering what he considered an invalid argument and one that might have led the jury deliberations into a wrong channel.

Nor do we find merit in defendant's attack upon the part of the charge relating to Decker's testimony as to the betting activity he had witnessed on his visits to the tavern. In the court of the charge the trial judge gave the jury the instructions:

> "I am not trying to tell you whether or not to believe him. That's for you to determine. You are the finders of the facts."

Defense counsel took no exception to this further instruction. He now argues, for the first time, that the charge violated defendant's rights to trial by jury and represented improper comment. The claim is that the trial judge equated a belief in Decker's testimony to a finding of guilt. We do not so view the corrected charge. The instruction was clear: the facts recited by Decker were sufficient as a matter of law to constitute a violation of the statute, but it was for the jury to believe Decker or not, and in doing so it was to consider all of the other testimony. Its belief in what Decker said had to be beyond a reasonable doubt.

Finally, defendant cites as plain error—see R.R. 1:5-1(a)—the trial judge's failure to instruct the jury specifically that criminal intent was an essential element of the

crime. Intent to commit the crime of bookmaking could be implied from defendant's acts on his tavern premises. Considering the charge as a whole, and the very strong proofs presented, we find no plain error.

The judgment of conviction is affirmed.

Mandate on Affirmance of the Superior Court of New Jersey, Appellate Division

(Filed—June 24, 1966.)

This cause having been duly argued before this Court by Frederick Klaessig, counsel for the appellant and Richard S. Cohen, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Middlesex County Court is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless a Notice of Appeal to the Supreme Court or a Notice of Petition for Certification has been filed or is pending, or unless otherwise ordered by this Court and that the record be remitted to the Middlesex County Court to be there proceeded with in accordance with the rules and practice relating to that Court, consistent with the opinion of this Court.

WITNESS the Senior Judge of the Part, Superior Court of New Jersey, Appellate Division, at Trenton on the 24th day of June, 1966.

MORTIMER G. NEWMAN, JR.,
Clerk of the Superior Court.

APPENDIX "B"

New Jersey Supreme Court Order Granting Petition for Certification

It is Ordered that the Order of October 4, 1966 denying the defendant's petition for certification be vacated, and

It is further Ordered that said petition for certification be granted.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this eighteenth day of October, 1966.

JOHN H. GILDEA
Clerk

APPENDIX "C"

New Jersey Supreme Court Opinion, 5 N. J. 49

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ALBERT BACSKO,

Defendant-Appellant.

Argued June 7, 1967—Decided July 20, 1967.

On appeal from the Superior Court, Appellate Division.

Mr. Frederick Klaessig argued the cause for appellant.

Mr. Richard S. Cohen, Assistant County Prosecutor, argued the cause for respondent (*Mr. Edward J. Dolan,* Middlesex County Prosecutor, attorney).

The opinion of the court was delivered

PER CURIAM. Defendant was convicted of bookmaking in violation of N.J.S. 2A:112-3. The conviction was affirmed by the Appellate Division in an unreported opinion. We granted certification. 48 N.J. 139 (1966). The principal issue is whether the trial court erred in refusing to require the disclosure of the identity of an informer. The issue is the same one involved in *State* v. *Oliver,* 50 N. J. 39 (1967), decided this day. For the reasons stated in *Oliver,* we agree with the judgment of the Appellate Division. No other question in the case requires discussion.

The judgment of the Appellate Division is affirmed.

For affirmance—Chief Justice WEINTRAUB and Justices JACOBS, FRANCIS, PROCTOR and HALL—5.

For reversal—None.

APPENDIX "D"

New Jersey Supreme Court Opinion, 50 N. J. 39 Re:
State of New Jersey, Plaintiff-Appellant v. Chester Oliver, Defendant-Respondent

Argued June 7, 1967—Decided July 20, 1967.

SYNOPSIS

Defendant was convicted of bookmaking. The Superior Court, Appellate Division, reversed, 92 N. J. Super. 228, 222 A. 2d 761. The Supreme Court granted certification, 48 N. J. 143, 24 A. 2d 327. That court, Weintraub, C.J., held that failure to require State to disclose identity of informer who did not bet or induce defendant to accept a bet from anyone, and who accompanied undercover agent to bar where defendant had allegedly engaged in bookmaking activities and where informer was a familiar figure only for purpose of shielding agent from suspicion agent might have generated as a stranger, and whose statements or observations were not used by prosecution was not improper.

The judgment of the Appellate Division reversed and judgment of conviction affirmed.

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1. Witnesses—216

That informer acted for pecuniary reward and was paid not merely for what he knew but also to seek out violations in places accessible to him did not take informer beyond informer privilege. Rules of Evidence, rule 36, N.J.S.A. 2A:84A-28.

Appendix D

2. Witnesses—216

Failure to require State to disclose identity of informer who did not bet or induce defendant to accept a bet from anyone, and who accompanied undercover agent to bar where defendant had allegedly engaged in bookmaking activities and where informer was a familiar figure only for purpose of shielding agent from suspicion agent might have generated as a stranger, and whose statements or observations were not used by prosecution, was not improper. N.J.S. 2A:112-3, N.J.S.A.; Rules of Evidence, rule 36, N.J.S.A. 2A:84A-28.

Mr. Richard S. Cohen, Assistant County Prosecutor, argued the cause for appellant (*Mr Edward J. Dolan,* Middlesex County Prosecutor, attorney).

Mr. Morris Spritzer argued the cause for respondent (*Messrs. Spritzer & Spritzer,* attorneys).

Mr. Joseph A. Hoffman, Assistant Attorney General, argued the cause for Attorney General of New Jersey, *amicus curiae* (*Mr. Arthur J. Sills,* Attorney General of New Jersey).

Mr. Brendan T. Byrne, Essex County Prosecutor, submitted a brief *amicus curiae* (*Mr. Barry H. Evenchick,* Assistant County Prosecutor, of counsel and on the brief).

Mr. Leo Kaplowitz, Union County Prosecutor, submitted a brief *amicus curiae* (*Mr. Anthony Luongo,* Assistant County Prosecutor, of counsel and on the brief).

Appendix D

The opinion of the court was delivered by

WEINTRAUB, C. J. Defendant Oliver was convicted of bookmaking in violation of N.J.S. 2A:112-3. The Appellate Division reversed because the trial court refused to order the State to disclose the identity of an informer. *State* v. *Oliver,* 92 N. J. Super. 228 (App. Div. 1966). We granted certification, 48 N. J. 143 (1966). The case was argued with *State* v. *Bacsko,* 50 N. J. 49 (1967), and *State* v. *Krempecki,* 50 N. J. 50 (1967), both decided today, which involve the same issue. In *Bacsko,* another part of the Appellate Division, in an unreported opinion, upheld the refusal to order disclosure. *Krempecki,* in which the trial court also refused to order disclosure was not considered by the Appellate Division because we certified it before argument there.

Oliver was charged with making book between April 13 and May 27, 1964. The principal witness for the State was Trooper Walter T. Decker of the State Police, as undercover agent with its Gambling Squad. He testified to bookmaking activities by Oliver at a tavern in New Brunswick, owned by one Del Bono, on three dates prior to the day of a raid under a search warrant.

The State made no reference to an informer but the defense, on cross-examination of Decker, elicited the fact that on all three occasions prior to the day of the raid an informer was seated with him at the bar. The informer did not place a bet. Nor did Decker. We gather the informer accompanied Decker only because the informer was a familiar figure at the bar and hence his presence tended to shield Decker from the suspicion he might have generated as a stranger. The informer was not there to be a witness but rather to make Decker less conspicuous. The Appellate Division said that Decker testified "that upon comparing

his observations with those of the informer they were in some respects not in accord" (92 N. J. Super., at p. 240). We do not read his testimony to be that there was a conflict upon anything, but rather that since the informer did not concentrate upon evidence of bookmaking, he did not see or hear some of the things Decker noted. There is nothing to suggest the informer would have contradicted any material testimony of Decker.

[1] Defendant first contends the unnamed man was beyond the common-law informer privilege and its codification in N.J.S.A. 2A:84A-28,[1] see *State* v. *Burnett*, 42 N. J. 377, 380 (1964), because he acted for pecuniary reward and was paid not merely for what he knew but also to seek out violations in places accessible to him. The Appellate Division correctly held that neither fact took him beyond the privilege.

The privilege exists to secure a flow of vital information which can be had only upon a confidential basis. Not all such information comes from people of high motivation. The police must have the aid of men of lesser quality who respond to selfish inducements, including money. These men are needed for what they know, but also for what they can learn because of their associations. This is especially true

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[1] The statute reads:

"A witness has a privilege to refuse to disclose the identity of a person who has furnished information purporting to disclose a violation of a provision of the laws of this State or of the United States to a representative of the State or the United States or a governmental division thereof, charged with the duty of enforcing that provision, and evidence thereof is inadmissible, unless the judge finds that (a) the identity of the person furnishing the information has already been otherwise disclosed or (b) disclosure of his identity is essential to assure a fair determination of the issues."

with rsepect to crimes of a consensual nature as to which there is little likelihood that a victim will complain. See *Lewis* v. *United States*, 385 U. S. 206, 87 S. Ct. 424; 17 L. Ed. 2d 312, 316, n. 6 (1966), and *McCray* v. *State of Illinois*, 386 U. S. 300, 8 S. Ct. 1056, 18 L. Ed. 2d 62, 71 (1967). The informer, paid or not, is subject to risks of retaliation which a regular member of a police force need not fear and hence, whether paid or not, he comes within the protection of the privilege.

[2] But we think the Appellate Division erred in holding that the State must disclose the identity of the informer. Here the informer played no part whatever in the criminal event. He did not bet, or induce defendant to accept a bet from anyone. Nor did the State attempt to get into the record of the trial anything the informer may have seen or said. It was the defense that brought out his presence at the scene, obviously to raise the immediate issue. But the defense was unable to show that the informer's testimony was necessary for a fair determination of the issues in the case. The defense could advance nothing more than an ungrounded hope that if the informer were called as a defense witness, he would say something which would somehow discredit the trooper and lead to an acquittal. We are not referred to any case which calls for a disclosure of a nonparticipant informer upon that rootless speculation.

In *Roviaro* v. *United States*, 353 U. S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957), the informer was a principal actor in the offense. He was the immediate party to the sale of the narcotics, and for a portion of the time he and the defendant were alone. Further the informer denied that he had ever seen the defendant when he was confronted with him. The Court did not say an informer must be revealed merely because he knows something about the criminal

event. Rather the opinion reads (353 U. S., at p. 62, 77 S. Ct., at p. 628, 1 L. Ed. 2d, at p. 646):

> "We believe no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

In holding that there the identity of the informer had to be revealed upon that balance, the Court stressed the prominence of the informer's role, the fact that his conversation with defendant was used by the prosecution, the nature of the defenses the circumstances affirmatively suggested might be available, and finally the testimony that the informer denied knowing defendant upon confrontation.[2]

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[2] The Court said (353 *U. S.*, at *pp.* 64-65, 77 *S. Ct.*, at *pp.* 629-630, 1 *L. Ed. 2d*, at *p.* 647):

"* * * Doe [the informer] had helped to set up the criminal occurrence and had played a prominent part in it. His testimony might have disclosed an entrapment. He might have thrown doubt upon petitioner's identity or on the identity of the package. He was the only witness who might have testified to petitioner's possible lack of knowledge of the contents of the package that he 'transported' from the tree to John Doe's car. The desirability of calling John Doe as a witnesss, or at least interviewing him in preparation for trial, was a matter for the accused rather than the Government to decide.

(Continued from preceding page)

In *Rugendorf* v. *United States*, 376 U. S. 528, 84 S. Ct. 825, 11 L. Ed. 2d. 887 (1964), defendant was convicted of knowingly receiving stolen fur pieces after their transportation in interstate commerce. The furs were found in the basement of his home. Defendant denied knowledge and apparently suggested his brother, an admitted "fence" for stolen goods, who had a key to the house, might have placed the furs there while defendant was out of the State. The affidavit used in obtaining the search warrant said the informer claimed to have been in the basement and to have seen the furs. Conceivably he could have shed light on how the furs got there, and whether with defendant's knowledge. The majority rejected the claim that the informer should have been disclosed for the purpose of the trial, finding the request for disclosure related only to the motion to suppress the evidence seized under the search warrant. Nonetheless the majority opinion commented upon the claim and concluded that the defendant had not met his burden to establish the criteria of *Roviaro*, saying, 376 U. S., at pp. 534-535, 84 S. Ct., at p. 829, 11 L. Ed. 2d, at pp. 892-893:

(Continued on following page)

Finally the Government's use against petitioner of his conversation with John Doe while riding in Doe's car particularly emphasizes the unfairness of the nondisclosure in this case. The only person, other than petitioner himself, who could controvert, explain or amplify Bryson's report of this important conversation was John Doe. Contradiction or amplification might have borne upon petitioner's knowledge of the contents of the package or might have tended to show an entrapment.

This is a case where the Government's informer was the sole participant, other than the accused, in the transaction charged. The informer was the only witness in a position to amplify or contradict the testimony of government witnesses. Moreover, a government witness testified that Doe denied knowing petitioner or ever having seen him before."

"He relied entirely on suppression, which, if successful, would have ended the case. Failing in this, petitioner asserted, for the first time, in his reply brief in the Court of Appeals that the name of the single informant who saw the furs was vital both for the suppression hearing and for the defense at trial, because the informant alone knew whether he 'participated with persons other than the defendant' in placing the furs in the basement. Apparently this was an attempt to bring the facts of the case within Roviaro v. United States, 353 U. S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957), where the informant had played a direct and prominent part, as the sole participant with the accused, in the very offense for which the latter was convicted. But there was not even an intimation of such a situation at the trial here. The necessity for disclosure depends upon 'the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.' 353 U. S. 53, 62, 77 S. Ct. 623, 629, 1 L. Ed. 2d 639 [646]. Petitioner did not develop any such criteria with reference to the merits of the case."

McCray v. *State of Illinois, supra,* 386 U. S. 300, 87 S. Ct. 1056, 1061, 18 L. Ed. 2d 62, 70, involved the refusal to disclose the informer's identity on a motion to suppress things seized on a search, but the Court discussed *Roviaro* and emphasized the special facts which there led to the holding that the informer should be revealed for the purposes of the trial:

"The *Roviaro* case involved the informer's privilege, not at a preliminary hearing to determine probable cause for an arrest or search, but at the trial

itself where the issue was the fundamental one of innocence or guilt. The petitioner there had been brought to trial upon a two-count federal indictment charging sale and transportation of narcotics. According to the prosecution's evidence, the informer had been an active participant in the crime. He 'had taken a material part in bringing about the possession of certain drugs by the accused, had been present with the accused at the occurrence of the alleged crime, and might be a material witness as to whether the accused knowingly transported the drugs as charged."

The Court added significantly that (386 U. S., at p. 311, 87 S. Ct., at p. 1062, 18 L. Ed 2d, at p. 70):

> "What *Roviaro* thus makes clear is that this Court was unwilling to impose any absolute rule requiring disclosure of an informer's identity even in formulating evidentiary rules for federal criminal trials."

Without stopping to consider factual nunces which may have contributed to the results, other cases in this area may be summarized in these general terms. Disclosure has been required where the informer was an actual party to the illegal transaction. *Portomene* v. *United States,* 221 F. 2d 582 (5 Cir. 1955); *People* v. *McShann,* 50 Cal. 2d 802, 330 P. 2d 33 (Sup. Ct. 1958); *People* v. *Durazo,* 52 Cal. 2d 354, 340 P. 2d 594, 76 A. L. R. 2d 257 (Sup. Ct. 1959). The cases are in conflict where the informer participated only to the extent of introducing the defendant to the officer to set the stage for the criminal transaction with the officer. Disclosure was denied in *United States* v. *Simonetti,* 326 F. 2d 614 (2 Cir. 1964); *United States* v. *Russ,* 362 F. 2d 843 (2 Cir. 1966), *cert.* denied 385 U. S. 923, 87 S. Ct. 236,

17 L. Ed. 2d 146 (1966); *United States* v. *Coke*, 339 F. 2d 183 (2 Cir. 1964); *United States* v. *Fredia*, 319 F. 2d 853 (2 Cir. 1963); *People* v. *Reed*, 21 Ill. 2d 416, 173 N. E. 2d 422 (1961), *cert.* denied 368 U. S. 990, 82 S. Ct. 606, 7 L. Ed. 2d 527 (1962); *Lee* v. *State*, 235 Md. 301, 201 A. 2d 502 (Ct. App. 1964). Holding the other way are *Gilmore* v. *United States*, 256 F. 2d 565 (5 Cir. 1958); *People* v. *Williams*, 51 Cal. 2d 355, 333 P. 2d 19 (Sup. Ct. 1958).

But as we have said, we know of no case holding that an informer must be revealed when he was no more than a witness to the criminal event. In *State* v. *Booker*, 86 N. J. Super. 175 (App. Div. 1965) an informer was with the narcotic agent when defendant approached the vehicle and himself initiated what resulted in a sale to the agent. The court held, and we think correctly, that "the mere fact that the informer was present does not take him out of the protection of the statute. Such presence is only one fact to be taken into consideration with all of the facts in determining whether 'disclosure or his identity to assure a fair determination of the issues' " (p. 179). *Cf. Zaroogian* v. *United States*, 367 F. 2d 959 (1 Cir. 1966).

As *Roviaro* said in the excerpt quoted above, the problem calls for balancing the public interest in protecting the flow of information against the individual's right to a fair determination of the issues. The most the defendant can say here is that he hopes that the informer, if called by him, would somehow destroy the State's case. If that unsupported hope suffices, it is obvious that an informer could no longer serve as a cover or decoy. This is so because in virtually all such cases, the informer would likely be able to testify as to something within the direct or cross-examination of the officer, thus offering a possibility of contradicting him. Upon that sheer speculation, a demand for disclosure would

be routinely made, not really with an expectation that defendant will call the informer, but rather to obtain the dismissal to which the prosecution would have to submit to honor its obligation to protect him.

In dealing with the informer privilege, we must be mindful of the ease with which the privilege would be destroyed if disclosure were required without a substantial showing of a need for it. So in *McCray* v. *State of Illinois, supra,* 386 U. S. 300, 87 S. Ct. 1056, 18 L. Ed. 2d at P. 68, and *State* v. *Burnett,* 42 N. J. 377, 385 (1964), it was held that upon a hearing as to probable cause to search, the identity of the informer cannot be demanded on the mere chance that he will contradict the statements the officer attributed to him, and in *State* v. *Dolce,* 41 N. J. 422, 428-429 (1964), we held that a defendant may not call for disclosure of a participant-informer upon an unverified assertion of entrapment, adding that if a defendant makes that assertion under oath to obtain disclosure, he will be protected from the use of the statement at the trial. As said in *Miller* v. *United States,* 23 F. 2d 279, 281 (5 Cir. 1959), *cert.* denied, 362 U. S. 928, 80 S. Ct. 756, 4 L. Ed. 2d 747 (1960):

> "* * * If the informer's relation to the acts leading directly to or constituting the crime may be assumed from a fertile imagination of counsel, the Government in practically every case would have to prove affirmatively that the informant had not done any such likely acts. Having done that, all would be revealed and the informer privilege, deemed essential for the public interest, for all practical purposes would be no more."

We recognize of course a remote possibility that an informer's testimony might serve some defendant. The dilemma is that ordinarily a defendant cannot know unless

the informer is made available, while to require him to be made available will end the prosecution and deny society the services of informers. We asked counsel for their views as to whether the knot could be cut by committing to a trial judge the power to question an informer privately or to consider a written statement of the informer, so limited as to preserve his anonymity, to determine whether his testimony would aid the defendant. We doubt that such a device could be used without revealing the informer or making the danger of his disclosure a forbidding possibility. Not infrequently an informer is known only to a single police officer and would not consent to a disclosure of his identity to a superior officer or even the prosecutor.

Perhaps a situation may arise in which some such procedure would be feasible and warranted. At the moment a choice seems unavoidable between a disclosure of the witness-informer in all cases or in none at all. A policy-decision must be made and it must rest upon probabilities. In those terms the risk of loss to defendants is pure conjecture, while the loss to society in its efforts to cope with crime would be real and substantial. The balance contemplated by *Roviaro* must be struck in favor of law and order. *Cf. State* v. *LaFera*, 42 N. J. 97, 107-108 (1964).

We agree with the Appellate Division's treatment of the remaining issues.

The judgment of the Appellate Division is reversed and the judgment of conviction is affirmed.

For reversal—Chief Justice Weintraub and Justices Jacobs, Francis, Proctor and Hall—5.

For affirmance—None.

APPENDIX "E"

Petition for Rehearing to the Supreme Court of New Jersey, Re: *State of New Jersey* v. *Chester Oliver*

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of New Jersey:

The defendant, Chester Oliver, presents this petition for a rehearing of the above cause and, in support thereof, respectfully shows:

1. On July 20, 1967 this Court rendered its decision reversing the Appellate Division (which reversed the trial court) and affirming the conviction.

2. The defendant seeks a rehearing upon the following grounds:

(a) In rendering its opinion this Court said

> "We gather the informer accompanied Decker only because the informer was a familiar figure at the bar and hence his presence tended to shield Decker from the suspicion he might have generated as a stranger. The informer was not there to be a witness but rather to make Decker less conspicuous. The Appellate Division said that Decker testified 'that upon comparing his observations with those of the informer they were in some respects not in accord. We do not read his testimony to be that there was a conflict upon anything, but rather that since the informer did not concentrate upon evidence of bookmaking, he did not see or hear some of the things Decker noted. There is nothing to suggest the informer would have contradicted any material testimony of Decker."

Appendix E

Likewise there is nothing to suggest in the record that the informer would have corroborated any material testimony of Decker.

Moreover it now appears that this Court was unable to find from the record that the so-called informer was employed with respect to Oliver to furnish "information purporting to disclose a violation of a provision of the laws of this State . . .", and this Court was only able to infer that he was employed "to shield Decker from the suspicion he might have generated as a stranger."

(b) Any possible previous use of the so-called informer in other cases involving other persons than Oliver cannot be the basis for providing an eternal and perpetual privilege in cases where he played no role whatsoever with respect to furnishing information.

(c) The privilege provided by the Statute (N.J.S.A. 2A: 84A-28) applies only to "a person who has furnished information etc.", and not to a miscellany of co-workers with the police who do not fulfill the explicit category articulated by the statute in the particular case on trial.

(d) The mere accompanying of a police officer to shield him from the suspicion the police officer might generated as a stranger does not constitute furnishing information; the record shows no other functions served by the so-called informer with respect to the Oliver case.

(e) If not a fully corroborative eye witness, the so-called informer was nevertheless fully present at close range and was at least a substantial eye witness. Holding that his identity must be disclosed in this particular case will not destroy any future operations between the police and their informers but will merely educate the police authorities to the scope and intent of the statute and the proper usage within that scope and intent.

(f) The solid fact remains that there is no evidence in the record that the so-called informer "furnished information in this particular case", further, that he was an actual repeated eye witness, further, that the only inferable purpose of his presence was to shield Becker from the suspicion he might have generated as a stranger, and further, that neither the Prosecutor nor the trial court, nor this Court to this very day is able to say with reasonable basis whether or not his testimony would not be in favor of the defendant; accordingly, the deprivation of access to or use of this witness by the defendant upon mere conjecture that there was no benefit available from him to the defendant is a deprivation of a fair trial.

(g) In effect this Court has promulgated retroactively a completely new rule of evidence (and for which as yet there is no legislative adoption), to wit:

> "A witness has a privilege to refuse to disclose the identity of a person who accompanies a police officer to shield him from the suspicion that the police officer might have generated as a stranger, and it shall not be required to sustain such privilege that there be offered any proof that said person furnished information in connection with the particular case being tried to a representative of the state . . . charged with the duty of enforcing etc.".

Trial counsel on both sides labored under the impression from the time the trial below started and through the final arguments in this Court that the issue was the privilege bestowed upon the explicitly defined category set forth in N.J.S.A. 2A:84A-28; certainly new categories outside the statute were justifiably not anticipated by defense counsel, and defense counsel now seeks a reasonable opportunity to argue against such new categories.

Appendix E

For the foregoing reasons, it is urged that this Petition be granted.

Dated: July 27, 1967.

Respectfully submitted,

SPRITZER & SPRITZER,
Counsel for Defendant-Respondent,
By: MORRIS SPRITZER.

I hereby certify that the foregoing petition is submitted in good faith and not for purposes of delay.

SPRITZER & SPRITZER,
Counsel for Defendant-Respondent,
By: MORRIS SPRITZER

APPENDIX "F"

Letter of July 27, 1967 to Supreme Court of New Jersey, Re: *State of New Jersey* v. *Chester Oliver*

July 27, 1967

JOHN H. GILDEA, Clerk
Supreme Court of New Jersey
State House Annex
Trenton, New Jersey 08625

Re: *State* v. *Oliver*
No. A-161 September Term 1966

Dear Mr. Gildea:

Enclosed are original and 11 copies of Petition for Rehearing in the above matter. I have served copies of the Petition directly upon Prosecutor Dolan and have this day mailed by certified mail, return receipt requested, copies of the Petition upon Attorney General Sills, Prosecutor Byrne and Prosecutor Kaplowitz, and when the return receipts are received I will file the Affidavits of Service with the receipts attached.

Fred Klaessig, Esq., attorney in Bacsko (A-160), and Howard L. Toft, Esq., attorney in Krimpecki (A-103) have requested me to indicate to the Court that they desire the Oliver Petition to apply also to their respective cases.

Respectfully yours,

SPRITZER & SPRITZER
By: MORRIS SPRITZER

MS/m
Encs 12

APPENDIX "G"

New Jersey Supreme Court Mandate on Affirmance

(Filed—July 20, 1967.)

This cause having been duly argued before this Court by Mr. Frederick Klaessig, counsel for the appellant and Mr. Richard S. Cohen, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court, Appellate Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court, Appellate Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable JOSEPH WEINTRAUB, Chief Justice, at Trenton, on the 20th day of July, 1967.

A TRUE COPY

JOHN H. GILDEA, Clerk
Clerk of the Supreme Court

APPENDIX "H"

New Jersey Supreme Court Order Denying Petition for Rehearing

(Filed—October 3, 1967.)

No Justice who voted with the majority having moved a reconsideration, the petition for rehearing is denied.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this third day of October, 1967.

JOHN H. GILDEA
Clerk

TABLE OF CONTENTS

	PAGE
REFERENCE TO OPINIONS BELOW	1
COUNTER-STATEMENT CONCERNING JURISDICTION	2
COUNTER-QUESTION PRESENTED	2
COUNTER-STATEMENT OF CASE	2
ARGUMENT:	
Point I—Where the informer plays no part in a criminal event and where the State does not attempt to introduce into evidence anything the informer may have said or seen and where the defense is unable to show that an informer's testimony is necessary for a fair determination of the issues in the case, nondisclosure of the name of the informer in no way violates defendant's rights	5
Point II—Defendant has no right of confrontation with an informer whose identity is protected by Statute	7
CONCLUSION	8

Cases Cited

Cooper v. State of California, —— U. S. ——, 87 S. Ct. ——, 17 L. ed. 2d 730 (1967)	7
McCray v. State of Illinois, —— U. S. ——, 87 S. Ct. ——, 18 L. ed. 2d 62 (1967)	6, 7
Roviaro v. United States, 353 U. S. 53, 77 S. Ct. 623, 1 L. ed. 2d 639 (1957)	5

PAGE

Rugendorf v. United States, 376 U. S. 528, 84 S. Ct. 825, 11 L. ed. 2d 887 (1964) 6

Statutes Cited

N.J.S. 2A:84A-28 ..... 3, 5

28 U.S.C.A. 1257 (3) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 730

ALBERT BACSKO,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Reference to Opinions Below

The petitioner's reference to the opinions below is correct; however, on page 10(a) the citation of the New Jersey Supreme Court as *5* N. J. 49 should read *50* N. J. 49, and all references in the Petitioner's Brief to the *Monmouth* County Court should read *Middlesex* County Court.

Counter-Statement Concerning Jurisdiction

Although conceding that if this Court has jurisdiction, the same is obtained through the provisions of 28 U.S.C.A. 1257(3), it is respectfully submitted that the Supreme Court of New Jersey did not decide any Federal questions of substance not heretofore determined by this Court or contrary to the applicable decisions of this Court.

Counter-Question Presented

Whether it was error for the Trial Court to refuse to order the State to disclose the name of an informer where the informer was not an active participant to the alleged crime, did not participate in any way therein and where no information emanating from him became part of the State's case.

Counter-Statement of Case

The defendant was indicted by the Middlesex County Grand Jury for bookmaking. Prior to trial, the defendant moved for an order requiring the State to disclose the identity of an informer. Accompanying the motion was an affidavit of the defendant in which he said he owned the Melody Bar in New Brunswick and that he attended A.B.C. hearings on the gambling charges underlying the indictment. He continued to say that Officer Decker of the State Police had testified at the hearing that he had seen gambling at the premises on April 9, 13, 15 and 28 and May 11, 1964 and that he was accompanied by an informer on each occasion. The defendant also said that he knows of his own knowledge that Decker was not at his tavern on those occasions and that the informer was there, alone on some of them. He said he needed the name of the informer to prepare his defense because it was the informer who was present to observe and not Decker, because in fact he, the

defendant, had not taken any bets, because he, the defendant, had been instrumental in exposing a counterfeiter who had threatened revenge, and because the informer could well have some connection with "this episode". Finally, he said he remembered a person who spoke Hungarian in his tavern on the dates alleged by Officer Decker.

The State offered no affidavits on the motion.

It asserted the State's privilege under N.J.S.A. 2A:84-28 to refuse to disclose the identity of an informer. The trial court denied the motion on the basis of the privilege.

At the trial, Officer Decker was the first witness. He testified that he was an Investigator in the State Police assigned as an undercover man in the field of gambling. He testified he first went to the Melody Bar on April 9, 1964 and saw a woman examine the racing section of a newspaper, hand the defendant a slip of paper and two dollars. The defendant pocketed the money and made a telephone call. He then went to the back room. On the same day another patron who was looking at the Armstrong Racing Sheet gave the defendant a slip of paper and two dollars and the defendant went to the back room. On April 13, 1964, Decker again went to the tavern. The same pattern of action was repeated. A patron gave the defendant a slip of paper and two dollars and said to the defendant, "This better wait. The first at Aqueduct looks good." The defendant replied, "They all look good." The defendant took the slip and money and went to the back room.

On April 15, 1964, Decker returned. He saw another similar transaction involving a patron and the defendant. Again on April 28, 1964, the pattern was repeated. Before handing the defendant a slip and money, a woman patron said to a man seated near her, "I like Wild Cargo and Jet Flare in the second at Aqueduct." On May 11,

1964, Decker again saw the same kind of slip-and-money transaction between a patron and the defendant.

Decker testified that he was usually accompanied to the defendant's tavern by a person whom he had met on April 8, 1964, and who speaks some Hungarian. The person took no notes but made some remarks as to what he had seen in the tavern. The person's observations formed no part of the witness's notes, recollection or testimony. He is not a member of the State Police and Decker referred to him as an informer. He didn't know if the informer was paid. The State objected to counsel's question as to the informer's identity, and the objection was sustained. Decker later testified the informer went into the Melody Bar on occasion without him, but he gave Decker no information as to what he saw on those occasions. Nothing Officer Decker testified to was derived from the informer's observations. Some of the things Decker saw were not seen by the informer, and the informer saw some things Decker did not see. Decker reported only what he himself saw.

The next witness was Michael Goch, a State Police Detective. He participated in a raid on the Melody Bar on May 26, 1964. A number of slips and papers current were found on the bar showing numbers of current horse bets. There were tally sheets and horse bettors' newspapers. Unquestionably, the documents found showed a volume of off-track horse betting. State Police Detective Niece also testified he participated in the raid. He testified as to the things found but was not qualified as an expert and so did not testify as to their meaning and contents.

The defense consisted of denials by the defendant, his wife and a few frequenters of the Melody Bar that any bookmaking had taken place there.

After summations and charge the jury retired for thirty-four minutes before returning with its verdict.

ARGUMENT

POINT I

Where an informer plays no part in a criminal event and where the States does not attempt to introduce into evidence anything the informer may have said or seen and where the defense is unable to show that the informer's testimony is necessary for a fair determination of the issues in the case, nondisclosure of the name of the informer in no way violates defendant's rights.

There is no question before this Court as to the constitutionality of the New Jersey Statute, N.J.S. 2A:84A-28, protecting the identity of an informer, nor is there any question as to the purpose or rationale for the existence of the Statute. Rather, the sole issue is whether the facts and circumstances of the present case require disclosure.

This Court has held in *Roviaro* v. *United States*, 353 U. S. 53, 77 S. Ct. 623, 1 L. ed. 2d 639 (1957):

> "We believe no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony and other relevant factors."

In that case the informer was not only an active participant in the alleged crime but had helped set up the occurrence thereof and, due to the nature of the crime, was the only person who could testify as to some of the elements of the crime necessary for a conviction or an acquittal. Fur-

thermore, when confronted with the defendant he denied any knowledge of him. Also, a possible entrapment situation may have been developed by his testimony.

A comparison of the circumstances in the present case with those in *Roviaro* reveals that patent dissimilarities exist in far greater abundance than the similarities between the two cases. Here, the informer merely observed and did not in any way participate, nor did any information from the informer become part of the State's case. The crime here in question is bookmaking and there was no testimony that any of the State's witnesses or the informer ever placed or attempted to place a bet with the defendant. No element of the crime or any defense thereto was dependent upon the testimony of the informer. Additionally, physical evidence was introduced through other State witnesses to show the nature and extent of the illegal operation and of off-track betting conditions at defendant's establishment.

Petitioner cites no case for the proposition that merely because the informer was present at some of the occasions when the commission of the crime took place, his name must be revealed, although that appears to be the gist and substances of his argument. Nor may the suppositious eventuality of the informer's conjectured possible contradiction of the State's witness' testimony be the alleged grounds for disclosure. *Rugendorf* v. *United States*, 376 U. S. 528, 84 S. Ct. 825, 11 L. ed. 2d 887 (1964); *McCray* v. *State of Illinois*, —— U. S. ——, 87 S. Ct. ——, 18 L. ed. 2d 62 (1967).

POINT II

Defendant has no right of confrontation with an informer whose identity is protected by statute.

Petitioner in Point IV of his Brief alludes to his right of confrontation with the "unidentified witness" under the Sixth Amendment applicable to the States through the Fourteenth Amendment. If by this, petitioner is claiming that the State violated the Sixth Amendment by not producing the informer to testify against the Petitioner and to be cross-examined by him, this Court has had occasion recently to pass upon the identical question. In *Cooper* v. *State of California*, —— U. S. ——, 87 S. Ct. ——, 17 L. ed. 2d 730, 734, Note 2 (1967) it is stated:

> "Petitioner also presents the contention here that he was unconstitutionally deprived of the right to confront a witness against him, because the State did not produce the informant to testify against him. This contention we consider absolutely devoid of merit."

See also *McCray* v. *State of Illinois, supra.*

CONCLUSION

It is respectfully urged that no substantial Federal question meriting review by this Court has been submitted in light of the fact that the decision of the New Jersey Supreme Court is in full accord with the decisions of this Court and, accordingly, the Petition for Certiorari should be denied.

Respectfully submitted,

EDWARD J. DOLAN,
Middlesex County Prosecutor,
Attorney for and of Counsel with Respondent, State of New Jersey.

DAVID J. MONYEK,
Assistant County Prosecutor,
Of Counsel and on the Brief.